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Nos. 81-2167, 81-2168

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF ARIZONA, et al., PETITIONERS,

v.

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO NATION, et al.,

---

THE STATE OF MONTANA, et al., PETITIONERS,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE SAN CARLOS APACHE TRIBE AND THE PAPAGO COMMUNITY OF TOHONO APACHE INDIANS FOR LEAVE TO FILE A POST-ARGUMENT MEMORANDUM AND POST-ARGUMENT MEMORANDUM

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Nos. 81-2147, 81-2188

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF ARIZONA, et al., PETITIONERS,

v.

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO NATION, et al.,

THE STATE OF MONTANA, et al., PETITIONERS,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF THE SAN CARLOS APACHE TRIBE AND THE PAYSON COMMUNITY OF YAVAPAI APACHE INDIANS FOR LEAVE TO FILE A POST-ARGUMENT MEMORANDUM

Under Rule 35.6 of the Rules of this Court, Respondents San Carlos Apache Tribe and Payson Community of Yavapai Apache Indians move for leave to file the annexed Post-Argument Memorandum.

These consolidated cases were argued on March 23, 1983. Following the argument, the federal government submitted a Post-Argument Memorandum. Subsequently, Peti-

tioners in No. 81-2147 submitted their own Post-Argument Memorandum. The Court granted leave to file both Memoranda on April 4, 1983.

In their Post-Argument Memorandum, Petitioners refer to the Apache Treaty of July 1, 1852, 10 Stat. 979. This is the first time Petitioners have addressed the Treaty at any stage of this litigation. For this reason and because the argument of Petitioners is erroneous, the San Carlos Apache Tribe and Payson Community of Yavapai Apache Indians seek leave to file the annexed short Memorandum limited to the points first addressed by Petitioners.

Respectfully submitted May 4, 1983.

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October Term, 1982

THE STATE OF ARIZONA, et al., PETITIONERS,

v.

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO NATION, et al.,

THE STATE OF MONTANA, et al., PETITIONERS,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, et al.,

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

POST-ARGUMENT MEMORANDUM FOR THE SAN CARLOS APACHE TRIBE AND THE PAYSON COMMUNITY OF YAVAPAI APACHE INDIANS

As stated in our main brief, in 1852 representatives of the Apache Nation, including ancestors of the San Carlos Apache Tribe and Payson Community of Yavapai Apache Indians, executed a treaty with the United States. Treaty With the Apaches, July 1, 1852, 10 Stat. 979.[1] As parties to the

[1] See 1 U.S.C. §112. Notwithstanding petitioners' argument, Pet. Post-Arg. Memo n. 7, both Apache Tribes before this Court constitute part of the Apache Nation and therefore both (Cont.)

Treaty, the United States and the Tribes herein continue to treat the Treaty as viable.

Petitioners reference two Court of Claims opinions[2] which cite, in dicta, a passage from Fort Sill Apache Tribe of Oklahoma, et. al., v. United States, 19 Ind. Cl. Com. 212, 238 (1968). In Fort Sill, several Tribes filed claims under the Indian Claims Commission Act[3] seeking compensation for the wrongful taking of their property. The Commission ruled that the United States wrongfully confiscated Indian lands and that the title to such lands derived not from any treaty but was held under aboriginal title. 19 Ind. Cl. Com. at 237, 260. The Commissioners commented in passing that "no one is in position to assert any benefits or rights" under the 1852 Treaty because "all parties" had violated its terms. Id. at 238.

It is clear that only Congress or the President, in some instances, could abrogate the Apache Treaty. It is not argued

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are entitled to rely upon the protections of the 1852 Treaty.

[2]United States v. Fort Sill Apache Tribe of Oklahoma, 533 F.2d 531 (Ct. Cl. 1976); Fort Sill Apache Tribe of Oklahoma v. United States, 477 F.2d 1360 (Ct. Cl. 1973), cert. denied, 416 U.S. 993 (1974).

[3]Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified as amended at 25 U.S.C. §§70 to 70v-3).

by Petitioners that the treaty was abrogated by either the President or Congress.

Whatever uncertainty surrounds the consitutional role of the Congress or the President in declaring treaties terminated[4], it is clear that there must be an explicit and express intention by either Congress or the President to abrogate Indian treaty rights.[5] The Indian Claims Commission did not have the authority to terminate the 1852 Apache Treaty which, under the Constitution, became the supreme law of the land.[6] The jurisdiction of the Commission was restricted to resolving Indian claims against the federal government. See 60 Stat. 1050.

During the Civil War, Congress expressly authorized the President to declare all treaties with tribes engaged in hostility toward the United States "abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and

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[4]See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979).

[5]Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968). See Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979); F. Cohen, Federal Indian Law, 222-23 (1982).

[6]U.S. Const. art. VI, §2. See United States v. Forty-three Gallons of Whiskey, 93 U.S. 188, 196 (1876).

legal and national obligations."[7] No President has terminated the 1852 Apache Treaty.

Moreover, Article XI of the Apache Treaty provides that it "shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States." The United States government has not terminated the Treaty.[8]

Finally, except for the one-sentence declaration by the Indian Claims Commission in Fort Sill and the two references,

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[7] Appropriations Act of July 5, 1862, ch. 135, §1, 12 Stat. 512, 528 (codified as carried forward at 25 U.S.C. §72).

[8] The United States has relied upon the continued validity of the Treaty, both before this Court and in the pending adjudication in state court. See Memorandum for the United States at 19 n. 23; United States Memorandum in Support of Motion to Dismiss, Maricopa County Superior Court, reprinted in Brief of San Carlos Apache Tribe and Payson Community of Yavapai Apache Indians, Appendix at F-4. The decision of the political department regarding the existence of a treaty must be accepted as conclusive. Terlinden v. Ames, 184 U.S. 270, 290 (1901); Fellows v. Blacksmith, 60 U.S. 366, 376 (1856).

Moreover, express procedural rules for the United States Senate require that amendment of Indian Treaties "shall be considered and acted upon by the Senate in its open or legislative session . . . ." Rule XXXVII, Senate Procedures, Watkins and Riddick, 578 (1958). See Brief of San Carlos Apache Tribe and Payson Community of Yavapai Apache Indians, 78. The Senate has not acted upon the 1852 Apache Treaty.

in dicta, by the Court of Claims to that declaration, all decisions of this Court and others, both before and after Fort Sill, recognize the continued validity of the 1852 Apache Treaty. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150 n. 5 (1973); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 346 n. 4 (1941); Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 724, 731 (10th Cir. 1980), vacated, 450 U.S. 1026 (1981), opinion reinstated, 677 F.2d 55 (10th Cir. 1982), cert. granted 103 S.Ct. 371 (1982); United States v. State of New Mexico, 590 F.2d 323, 325 (10th Cir. 1978), cert. denied 444 U.S. 832 (1979); Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967, 971, 977, 983-85 (10th Cir. 1980), cert. denied, 450 U.S. 959, (1981); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 549 (10th Cir. 1980) aff'd, 102 S.Ct. 894 (1982); Mescalero Apache Tribe v. Burgett Floral Co., 503 F.2d 336, 337 (10th Cir. 1974); Goddard, San Carlos Apache Tribe v. Babbitt, 536 F. Supp 538, 540 (D. Ariz. 1982); Chino v. Chino, 561 P.2d 476, 479 (N.M. 1977).

It is clear, however, as maintained by the Tribes from the beginning, that Arizona has no jurisdiction over the Tribes or their Reservation property. The Fort Sill[9] case, cited by

[9] 477 F.2d 1360 (Ct.Cl. 1973) cert. denied, 416 U.S. 993 (1974).

the Petitioners in an effort to cast shadows on the Treaty, relies in part on the Lipan Apache[10] case. There the Court discussed the power of Texas to deal with Tribes and to extinguish aboriginal title of Tribes. The case confirms:

> . . . the exclusive power of the United States to extinguish Indian title even if the ultimate legal fee holder is a State. (Emphasis added.) Santa Fe Pac. R.R. reaffirms this longstanding practice. Appellee cites Seneca Nation v. Christy, 126 N.Y. 122, 137, 27 N.E. 275-79 (1981), writ of error dismissed, 162 U.S. 283 (1896), as declaring that the thirteen original States (which retained their public lands) had the power to extinguish Indian title, but that court's statement refers, at most, to extinguishment by agreement with the Indians. We have been cited to no authority holding or suggesting that any State has had the power to abrogate Indian ownership in invitum. That drastic power resides solely in the United States which is charged by the Constitution with oversight of Indian matters.
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> The State of Texas is not excepted from the rule applicable to all other States. It entered the Union on an "equal footing" with the others (United States v. Texas, 339 U.S. 707 (1950)) and "the United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like." Id. at 717-18. The State's retention of its public domain no more meant that it kept its pre-admission power over Indians than the like retention by the original States of their lands precluded the Federal

[10] Lipan Apache Tribe v. United States, 180 Ct.Cl. 487 (1967).

Government's authority. Worcester v. State of Georgia, supra. Prior to Texas' admission there may have been doubts on this score, but they have long since been set to rest by the post-admission history and the "equal footing" doctrine.[11]

CONCLUSION

Until expressly declared terminated by the President and the Congress, the 1852 Treaty continues in effect and the Apaches remain "exclusively under the laws, jurisdiction, and government of the United States of America."

Respectfully submitted May 3, 1983.

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[11] Id. at 498-99.